

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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MAR - 11 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

and

Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)
800 MHz SMR)

PP Docket No. 93-253

To: The Commission

REPLY COMMENTS
OF
ENTERGY SERVICES, INC.

ENTERGY SERVICES, INC.

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EXECUTIVE SUMMARY

Entergy Services, Inc. ("Entergy") and its subsidiaries provide electric utility services to over 2.3 million customers. In conducting these critical utility operations in as safe a manner as possible, the companies rely heavily on 800 MHz land mobile operations in order for emergency personnel to communicate effectively. Proposals advanced by both the Commission and commenters in this instant proceeding could profoundly affect the viability of these important 800 MHz communications systems.

Entergy submits the instant Reply Comments to address three specific issues. First, Entergy strongly opposes the Commission's proposal to devote the General Category spectrum to Specialized Mobile Radio ("SMR") use exclusively. Notwithstanding the number of speculative SMR applications for these channels, Private Mobile Radio Service ("PMRS") entities like Entergy have a substantial interest in continued access to this spectrum block. Second, Entergy urges the Commission to consider the Comments of Nextel Communications ("Nextel") as outside the scope of this proceeding. In its Comments, Nextel has proposed to substantially revise the PMRS licensing rules and regulations, and Entergy strongly doubts that all

affected parties have been afforded a reasonable opportunity to comment on Nextel's initiatives.

Finally, Entergy opposes certain proposals set forth by Nextel as they would have a disproportionate impact on Entergy and other similarly situated PMRS entities. In particular Nextel has proposed (1) to freeze licensing of Business and General Category spectrum, (2) to cancel all extended implementation schedules for licensees operating in the "new" SMR block, and (3) to limit access to the General and Business Category spectrum to relocated SMR parties only. Entergy and other PMRS entities have relied on the Commission's rules and regulation in licensing their respective systems. The Commission cannot now change these rules to benefit one licensee at the expense of so many others.

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To: The Commission

REPLY COMMENTS
OF
ENTERGY SERVICES, INC.

Entergy Services, Inc. ("Entergy"), through its undersigned counsel and pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.415, hereby submits these Reply Comments in response to the Comments submitted in connection with the Commission's Further Notice of Proposed Rule Making ("FNPRM") issued in the above-captioned proceeding.^{1/}

^{1/} 59 Fed. Reg. 60,111 (November 22, 1994).

I. Statement of Interest

1. Entergy is one of the largest electric utility holding companies in the country; its subsidiaries include five electric utility operating companies (or "OPCOs") -- Gulf State Utilities, Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service Company. Together, the OPCOs operate an integrated electric utility system under the Entergy umbrella which serves over 2.3 million customers. The Entergy service territory includes the State of Louisiana, almost all of the State of Arkansas, a portion of Texas and the western half of Mississippi. Collectively, Entergy and its OPCOs hold numerous authorizations for land mobile radio facilities in the 800 MHz frequency band.

2. Entergy's utility operations are critical to the normal functioning of society within its service territory. Most aspects of modern life in this portion of the south are dependent upon Entergy's electricity. As recent natural disasters across the country have demonstrated, without electricity, hospitals are forced to dramatically reduce service, traffic snarls and deadlocks, businesses must close, and even state and local public safety agencies are severely hampered in performing their duties.

3. Moreover, for the benefit of both Entergy's customers and its employees, Entergy must conduct its utility operations in an exceptionally safe and efficient manner. Although its customers rely on Entergy to maintain its facilities and recover from calamities as quickly as possible, Entergy's electric services demand that its line crew and other emergency response personnel exercise extreme care at every step in the restoration process. Obviously, these conditions require Entergy to maintain as reliable a communications system as possible. Reliable land mobile radio communications links are, in essence, the direct lifeline to Entergy personnel and, as such, are part of the larger lifeline between the electric utility and the public.

4. To address its land mobile radio needs, Entergy has initiated an extensive upgrade of its land mobile communications network over the past several years. The principal goal of the upgrade is to implement a wide-area 800 MHz system for all of Entergy. This upgrade is critical to the more efficient utilization of ratepayers' resources over the long term and to meet demands for ever-safer, more reliable electric service. Entergy's territory-wide 800 MHz communications system will be critical to enhancing emergency responsiveness, to coordinating bulk movement of personnel and material to respond to outages and other

regionalized needs, and to the safe repair of high voltage transmission and distribution lines.

5. In developing its 800 MHz land mobile radio system, Entergy and its OPCOs have secured channels from the General, Business, and Industrial/Land Transportation Categories. However, Entergy's ability to expand its 800 MHz system and to meet internal and customer service demands could be seriously compromised due to some of the proposals set forth by both the Commission and commenters in the instant proceeding. Needless to say, because of the importance of Entergy's communications operations as set forth above, the continued viability of all aspects of its 800 MHz radio system is vital and must be sustained at all times.

II. Discussion

6. Except for a few items directly affecting Private Mobile Radio Service ("PMRS") licensees, such as regulatory classification and the new FCC Form 600, the several rule makings and orders released in Docket Nos. 93-144 and 93-235 largely have focused on the Commercial Mobile Radio Service ("CMRS") and, in particular, the 800 MHz Specialized Mobile Radio ("SMR") service. In fact, the Commission's primary

goal of the FNPRM is its proposal for a "new comprehensive regulatory structure for licensing of 800 MHz SMR providers."2/ Consequently, Entergy, as a PMRS licensee and like many other similarly situated entities, had decided not to be an active participant in these CMRS proceedings. Recent developments in the instant proceeding, however, have led Entergy to file these Reply Comments.

7. Much to Entergy's dismay, the Commission's FNPRM proposes, as one of three alternatives, to designate the entire General Category spectrum block for SMR applicants exclusively in the future.3/ Entergy strongly opposes that proposal and now seeks to respond to those parties who have supported that position. Also, Entergy responds to the Comments of Nextel Communications ("Nextel") in which Nextel takes the Commission's General Category proposal to the extreme and suggests the exclusive allocation of both the General Category and Business Category for SMR relocation purposes.4/ Nextel advances several other changes to the Commission's licensing rules and regulations that would profoundly impact the ability of Entergy and other similarly

2/ FNPRM at ¶ 12.

3/ Id. at ¶ 37.

4/ Nextel Comments at 9.

situated PMRS entities to license, construct and expand their existing 800 MHz systems. Entergy strongly opposes these Nextel initiatives and respectfully suggests that the Commission regard Nextel's Comments as beyond the scope of this proceeding. Entergy is pleased to submit the following Reply Comments for the Commission's consideration in this proceeding.

A. Due to the Volume of Non-SMR Activity in the General Category, this Spectrum Block Cannot Be Allocated to SMRs Exclusively.

8. As alluded to above, Entergy is licensed for a number of General Category channels throughout the Entergy service territory. Entergy secured these channels initially in the New Orleans area during the early licensing of its wide-area system as a result of spectrum congestion in the other 800 MHz spectrum categories. In an effort to implement an appropriate channel re-use scheme throughout its service territory, Entergy and its OPCOs have licensed or are in the processing of licensing these General Category channels across Arkansas, Louisiana, Mississippi, and Texas. The viability of the Entergy system hinges on its ability to re-use this group of General Category channels. The Commission is well aware that the efficiency of vehicular mobile and portable radio units is greatly enhanced by a

licensee's ability to re-use channels across an operating territory.

9. In its FNPRM, the Commission debates the continued use of the General Category spectrum by SMRs.^{5/} While it recognizes that it has allocated the General Category channels for extensive PMRS as well as CMRS use, it still suggests an alternative whereby the entire General Category would be allocated for future licensing by SMR applicants exclusively.^{6/} Several entities associated with the SMR industry have seized upon the Commission's proposal, and have made unsupported assertions that the General Category should become the exclusive territory of the SMRs. "The relative demand for SMR services warrants making the General Category channels exclusive SMR channels."^{7/}

10. Notwithstanding these claims, Entergy would like to note that it and many other similarly situated licensees have relied on the General Category as either the basis or a significant supplement to their PMRS communications systems. For example, in its Comments, the Association of Public-

^{5/} FNPRM at ¶¶ 51-54.

^{6/} Id. at ¶ 53.

^{7/} Nextel Comments at 9. See also, OneComm Comments at 28.

Safety Communications Officers-International ("APCO") noted the extensive use of the General Category by public safety entities. In fact, APCO reported that 300,000 public safety radio units are licensed on General Category channels to over 450 state and local government public safety agencies.8/

11. While Entergy acknowledges that speculative SMR applications have given rise to the appearance that the General Category is primarily licensed by SMRs, it respectfully suggests the Commission may seek to distinguish between licensed and constructed facilities and merely licensed facilities. Also, the Commission must never lose sight of the public interest considerations in limiting the ability of utilities, public safety and other PMRS entities to expand their existing systems. Entergy notes that SMRs already have an SMR Category allocation of 280 channels, and yet the number of actually constructed and operational SMR providers appears to be quite minimal. To allocate the General Category exclusively to SMRs would be shortsighted and would punish those noncommercial entities that have spent substantial money in developing PMRS 800 MHz land

8/ APCO Comments at 3.

mobile radio communications systems with General Category frequencies.

- B. The Commission Should Not Consider Nextel's Comments Because They Are Beyond the Scope of this Proceeding.

12. Nextel in its Comments proposes that the Commission establish a new SMR spectrum block out of the 150 General Category channels and the 50 Business Category channels; this new spectrum block would be the "exclusive" home for SMR licensees moved from the upper 200-channel SMR block.^{9/} While the Commission did open the door to allocating "the entire General Category for future licensing exclusively to SMR applicants,"^{10/} Nextel has taken this proposal to the extreme by making the spectrum block available to relocated SMRs only, not any SMR applicant, and, more importantly, by including Business Category spectrum in this new spectrum block.^{11/} At no place in

^{9/} Nextel Comments at 9.

^{10/} FNPRM at ¶ 53 (underline added).

^{11/} While the distinction may appear slight, by distinguishing between relocated SMRs and SMR applicants, Nextel is excluding any potential SMR from applying for General Category spectrum in favor of those relatively few licensees who may relocate from the upper 200 channels of SMR Category spectrum. Entergy contends that the number of relocated SMRs would be relatively few as commenters have argued that Nextel is the super majority licensee in this

(continued...)

its FNPRM has the Commission proposed such an extreme reallocation.

13. In its Comments, Nextel also has proposed: (1) to freeze licensing of Business and General Category spectrum, (2) to cancel all extended implementation schedules for licensees operating in the "new" SMR block, and (3) to limit access to the General and Business Category spectrum to relocated SMR parties only.^{12/} This is a radical revision of the Commission's rules and regulations governing PMRS licensing, and Entergy suggests that it is highly unlikely that all parties that will be affected by these proposals have had an opportunity to review Nextel's Comments. It is the Commission's obligation to ensure that all affected parties have a reasonable opportunity to respond to these specific proposals. Nextel's spectrum reallocation and other licensing proposals would impact 800 MHz PMRS licensees that have not been affected by this proceeding up until this point. These licensees must be placed on notice and afforded a reasonable opportunity to comment on Nextel's proposal beyond this Reply Comment phase.

^{11/}(...continued)
spectrum block across the country. See generally, Southern Comments.

^{12/} Nextel Comments at 9-10, 33-38.

14. Entergy respectfully suggests that the Administrative Procedures Act ("APA") must be followed in this proceeding. It urges the Commission to not act on any of the proposals advanced by Nextel that would affect PMRS licensing. Section 553(c) of the APA specifically provides:

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this subsection.^{13/}

In interpreting "notice," the U.S. Court of Appeals for the District of Columbia has repeatedly ruled that "adequate notice is given when the final rule is a 'logical outgrowth' of the one proposed."^{14/} Entergy respectfully suggests that while Nextel's proposals may be considered an outgrowth of this proceeding, it could hardly be suggested that these recommendations, which would substantially impact 800 MHz PMRS licensing, are "logical" given the fact that most PMRS

^{13/} 5 U.S.C.S. § 553(b).

^{14/} Horsehead Resource Development Company v. Browner, 16 F.3d 1246, 1267 (D.C. Cir. 1994), cert. denied, 115 S.Ct. 72 (citation and internal quotation marks omitted) (underlined added).

licensees likely have not even had an opportunity to review the Nextel Comments.

15. Moreover, the Commission must remain mindful that the courts have noted that it is the obligation of the agency to provide notice under the APA, and that the agency cannot rely on the notice of public comments.

The EPA makes much of the comments submitted on issues that were to become critical parts of the final rule, as well as the meetings it held with industry. While we have noted that insightful comments may be reflective of notice and may be adduced as evidence of its adequacy, we have rejected bootstrap arguments predicated on public comments alone. Ultimately, notice is the agency's duty because comments by members of the public would not in themselves constitute adequate notice. Under the standards of the APA, notice necessarily must come - if at all - from the Agency.^{15/}

The Commission must dismiss Nextel's Comments as beyond the scope of this proceeding and require Nextel to file a separate Petition for Rule Making, or, at a minimum, the Commission must adopt another Notice of Proposed Rule Making detailing Nextel's intricate proposals.^{16/}

^{15/} Id. at 1268 (citation and internal quotation marks omitted).

^{16/} It also should be noted that a court will not allow short congressional time frames to vitiate the requirement for fully reasoned decisions. In Portland Cement Assoc. v. Ruckelshaus, the court stated that, despite the need for expediency, "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree [sic], is

(continued...)

16. Indeed, the instant proceeding already is derived by such a Commission procedural action regarding a Nextel proposal. In its FNPRM, the Commission noted that

[b]ecause the specific elements of the Nextel proposal were not presented in the CMRS Further Notice, however, and in light of the variety of other views expressed in the CMRS proceeding, we concluded that adoption of final rules for 800 MHz SMR systems should be deferred and a further notice of proposed rule making in this docket issued to afford an opportunity for further public comment on specific alternatives.^{17/}

Entergy suggests that until such time as Nextel completely discloses its licensing plan for all 800 MHz spectrum, the Commission should defer review of Nextel's Comments until the Commission can properly allow other affected licensees to review and comment on Nextel's proposals.

C. Nextel's Proposals Would Have a Profound Negative Impact on Entergy and Other Similarly Situated PMRS Licensees.

17. Despite the focus of this proceeding on the licensing of 800 MHz SMR providers, in its Comments, Nextel has proposed to radically restructure the Commission's rules and regulations governing PMRS licensees. Among other suggestions, Nextel has proposed: (1) to freeze licensing

^{16/}(...continued)
known only to the agency." 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

^{17/} FNPRM at ¶ 11.

of Business and General Category spectrum, (2) to cancel all extended implementation schedules for licensees operating in the "new" SMR block, and (3) to limit access to the General and Business Category spectrum to relocated SMR parties only.^{18/} Entergy strongly opposes all of the above proposals because they have a disproportionate impact on Entergy and other similarly situated PMRS entities.

18. Entergy is currently licensed for 800 MHz spectrum primarily from the General Category pool. It now is in the process of expanding its existing system to adequately cover the territories of all five OPCOs that operate under the Entergy system. Nextel's proposals to restructure the licensing rules and regulations for General Category and Business Category licensing would end Entergy's ability to expand its system and to implement a viable frequency re-use scheme.

19. In planning its system, Entergy and other utilities strive to maintain highly reliable, fast access, and interference-free communications networks. Availability of effective and continuous communications during all emergency situations is vitally important to utilities. A

^{18/} Nextel Comments at 9-10, 33-38.

wide range of critical personnel use these communications systems during emergency situations. Entergy's efforts to implement an essentially seamless 800 MHz communications system hinge on its ability to license additional 800 MHz spectrum to meet existing and future demands. If adopted, Nextel's proposals to freeze General and Business Category licensing and to reallocate the two frequency pools would eviscerate both of Entergy's objectives. Applications that are currently pending at the Commission would be frozen for years to come (with little chance for grant) and a large block of 200 channels would no longer be available to Entergy. For some reason, Nextel believes that Entergy and its fellow utility/land transportation entities only require 50 channels of 800 MHz spectrum to share, while it should be entitled to its own block of 200 contiguous 800 MHz channels.

20. Due to the critical nature of the traffic to be carried over Entergy's system, even minimal levels of interference to its communications operations could have disastrous results. Needless to say, because of the importance of Entergy's communications operations, the continued reliability of all phases of its 800 MHz radio system is vital and must be sustained at all times. Floods, lightning, tornadoes, and other natural or man-made

catastrophes are often accompanied by large scale power outages. Thus, communications within Entergy are most critical at the very times when they are most susceptible to failure. Consequently, a high degree of redundancy and a fail-safe design are essential to the success of the land mobile radio system.

21. Based on justifications like the one set forth above, Entergy, its OPCOs, and countless other utilities have successfully applied for and received extended implementation authority to build out their PMRS systems. In many instances, General Category and Business Category channels are covered by these slow growth grants. Entergy is pleased to report that extended implementation status has allowed Entergy and its OPCOs the additional time necessary to build out a viable and efficient land mobile radio 800 MHz communications system throughout Arkansas and Louisiana. Without slow growth authority, it would have been difficult for Entergy to meet the Commission's construction benchmarks.

22. Entergy still has a slow growth schedule in place to build out a portion of its 800 MHz land mobile radio system in Texas. This expansion of the Entergy 800 MHz network relies heavily on General Category and Business

Category spectrum. If Nextel's proposal to eliminate slow growth is adopted, Entergy's construction goals will be thwarted. A utility of Entergy's size must move forward at a deliberate pace; construction progress is limited by ratepayer concerns, capital budget committee restrictions and state utility commission considerations. Entergy has followed the Commission's rules in applying for this spectrum, and in securing slow growth status for its licenses. The Commission cannot turn its back on Entergy and other PMRS licensees and change the rules in midstream merely to accommodate the needs of one licensee.

Conclusion

23. The Commission cannot ignore the communications needs of Entergy and other PMRS licensees in developing a new licensing scheme for 800 MHz SMRs. The Commission must remain mindful of these interests and realize that it cannot allocate the General Category spectrum to SMRs on an exclusive basis. In its Comments, Nextel has failed to recognize the communications needs of PMRS licensees and has proposed radical changes to the Commission's existing rules and regulations that govern PMRS licensing. Entergy strongly opposes these proposals, and urges the Commission to delay action on the Nextel Comments so that all affected

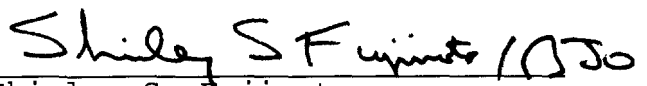
parties have an opportunity to respond to the proposals therein.

WHEREFORE, THE PREMISES CONSIDERED, Entergy Services, Inc. urges the Commission to consider these Reply Comments and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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